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ABSTRACT

This paper describes some of the many problems now facing the juvenile justice system, which was for years a legal "stepchild." A historical review reveals that although the first juvenile court was founded in 1899, the first U.S. Supreme Court review did not occur until almost 70 years later. Then, in a landmark decision, juveniles were given such basic rights as right to counsel, right to confront witnesses, right to notice of charges, and right to remain silent. Questions cited as currently facing the juvenile court system include coercion; proportionality of disposition to offense; transfer to adult court; and the scope of due process. The author concludes with a plea for comprehensive, accurate recordkeeping, since decisions on these issues cannot be made without a foundation of carefully kept data. (Author/BP)

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Department of Justice

JUVENILE JUSTICE IN THE UNITED STATES

by

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JUVENILE JUSTICE IN THE UNITED STATES

by

Paul Nejelski

Although approximately half of the crime in the United States is committed by juveniles, juvenile courts traditionally have been relegated to a second class status and generally forgotten by the lawyers, legislators and planners. As one judge rather ineloquently commented: "The juvenile court in the United States is the latrine duty of the judiciary. You put in a few years and hope you will be promoted to a more prestigious court paying better with fewer problems."

This second class status is paradoxical since the work of the juvenile court is at least as important as the general trial courts. The people who appear in juvenile and family courts have enormous problems. These courts are society's last resort in attempting to deal with break down in families, in cultural traditions and in other related social institutions such as schools.

A recent survey on conditions in the United States noted the following signs of disintegration in the family:

: There is one divorce for every two marriages.

: Teenage drug and alcohol abuse continue to rise.

: A second leading cause of death among young Americans between 15 and 24 is suicide.

: For the first time a majority of American mothers hold jobs outside of the home.

: Every year, one million children run away from home, and this figure represents mainly middle class children. There are many more children who leave home and simply move in with an older brother, other family member or friend and are never reported to the police or other authorities.

: A social psychiatrist recently concluded that in terms of broken homes, working mothers and child abuse, in the middle class today is approaching the level of social disorganization that characterized the low income family of the early 1960's".

In addition to the break down in family and cultural traditions, we are also confronted with a fiscal crisis in local government. New York City is not alone in its difficulty in providing minimal social services to its population. It is doubtful that significant increases in resources will be available for prevention, diversion or court processing of juveniles.

One important result of these shortages may be a growing recognition that we cannot justify massive intervention in the life of a juvenile and family based on the hope that <u>in the future</u> there will be more resources, more programs, more group homes, more psychiatric counseling.

The history of programs aimed at the rehabilitation of juveniles has been marked by criticism and controversy since the inauguration in 1825 of separate juvenile correctional

facilities in New York and the emergence of separate juvenile courts toward the end of the last century. Social science theory has had an important impact on separate processes for juveniles since the mid-nineteenth century.

Champions of "social darwinism" such as Herbert Spencer and William Graham Sumner discouraged public or private assistance for delinquent and wayward juveniles from the lower social classes, as a futile or even harmful attempt to counter the laws of natural selection. A more optimistic view of rehabilitation espoused by such writers as Jane Addams, who began the settlement house movement in 1889 at Hull House in Chicago, ultimately prevailed and formed a climate hospitable to innovations such as court supervised probation and a separate court system for juveniles.

Research studies of the resultant rehabilitative efforts mirror the increasingly sophisticated methods for collecting the analyzing data available in the behavioral sciences. At least three major themes are currently reflected in juvenile justice research and public policy.

The first focuses on the treatment of the individual child, particularly studies of the inmates of correctional institutions. For example, H. Ashley Weeks' "Youthful Offenders at Highfields," (1958) suggested that short term residential treatment of approximately 4 months was more effective for individual delinquents than the normal 12-month period of incarceration.

The second theme emphasizes the role of groups which help shape a juvenile. "The Provo Experiment in Delinquency Rehabilitation," (1961) by LaMar Empey and Jerome Rabow demonstrated the rehabilitative advantages of focusing on changing shared characteristics through guided peer group discussion.

Perhaps the most popular current area of study is the examination of institutions, such as police or juvenile courts, which help define and identify the child in need of treatment. "The Analysis of Delinquent Behavior: A Structural Approach," (1968) by John Martin, Joseph Fitzpatrick and Robert Gould is illustrative of this approach. It urged that delinquency be viewed in terms of racial, class and other social conflicts inherent in urban neighborhoods and the agencies created by society to deal with them.

Each of these research themes has had an important impact on programs designed to help treat or rehabilitate children. For instance, short term commitments and the use of group-oriented treatment are widely used in correctional institutions. Youth Service Bureaus which are supposed to serve as advocates in reducing the conflict among or obtaining services from existing institutions have rapidly expanded since they were proposed in 1967 by the National Crime Commission.

Another contemporary example of the relationship between research and policy has been the findings of the generally poor results attributed to the juvenile justice system. About 75% of all juveniles who have been incarcerated in training

schools are arrested at a later time for another offense. This inability of the juvenile justice system to demonstrate positive results has raised a series of issues currently being litigated under the general title of "the right to treatment." The rationale for intervention is undermined to the extent that there are no programs or the existing programs do not rehabilitate.

Until the last ten years, the juvenile court had been largely forgotten by the courts, the legal scholars and lawyers in general. Although the first juvenile court was founded in 1899 in Chicago, the first United States Supreme Court review did not occur until almost seventy years later with the celebrated Gault decision.* As you recall, Gault held that under the federal constitution there was (1) a right to counsel, (2) a right to confront and cross examine witness, (3) a right to notice of charges, (4) a right to remain silent in the juvenile court. Although the implementation of Gault and the rights enunciated therein has been uneven in the United States, there has been an increase in the number of lawyers appearing both as defense counsel and representatives of the state. There has been greater pressure that the juvenile court judge be a lawyer. There has been a trend to greater use of transcripts and appellate review.

But Gault and subsequent Supreme Court cases have not necessarily been a panacea. They have instead underlined the question of whether the juvenile court is a court or a social agency.

*387 U.S.1 (1967)

The American legal scholar Roscoe Pound had special interest in the juvenile court, and two statements of his emphasized the tensions between the court and the social agency role. Early in the history of the juvenile court movement, Pound said that the juvenile court was the greatest innovation since the Magna Carta. This was obviously an enthusiastic endorsement of the court, but not unrealistic in light of the fact that the juvenile court had pioneered many of the institutions and practices thought to be reforms in the early part of the century -- probation, the use of social history in sentencing, indeterminate sentences, and even the explicit recognition of preventive detention.

Writing approximately twenty years later, Pound took a more sober view of the juvenile court when he said that the court had greater power than the infamous Star Chamber of seventeenth century England. Until Gault, the juvenile judge had largely unbridled power. With no counsel present for either side, informality prevailed.

In recent years, while the juvenile justice system is growing in many ways similar to the adult adversarial system, the adult system over the years has also grown to be more like the juvenile system. For example, probation, presentence reports, indeterminate sentences, and preventive detention have all been introduced for better or worse into the adult system. In many respects the two are growing together, each progressing toward a middle ground rather than either being terminated by the other.

Despite the similarity between the two systems, there will always be special problems in any court which deals with juveniles because of the status of young people in our society. For example, there are problems of separating the interests of parents from those of the children. In many cases, not only should the child have counsel but the parent's separate interest should also be represented. Too often in the past the parent has been willing to waive the rights of their children in order to reach a quick disposition. Then too, children are always in someone's custody whether it is the parent, the school or juvenile court. In addition, their immaturity, for example their inability to write letters or otherwise make their plight known, creates special problems when they are incarcerated or run away from home.

The dual nature of the American juvenile court was well summarized by Roscoe Poun : "it is a good thing for lawyers and social workers to be suspicious of each other." Both professions have strengths and both have weaknesses. At least in the United States, there would be a general suspicion of a system where either reigned supreme.

In many ways it maybe easier for others at this conference to discuss conditions in their countries since juvenile justice is governed by a single statute which has application throughout the country. In contrast, the United States includes the fifty states, the District of Columbia and the federal jurisdiction, all of which makes it very difficult to generalize about the state of juvenile justice in my country.

This variety offers a rich potential for experimentation which unfortunately is rarely utilized to the fullest extent possible. For example, ten states allow jury trials in juvenile cases but little is known about how often juries are requested and their impact on the juvenile court.

However, I would like to point out several areas which have been of growing concern in the wake of Gault and an increased legalization of the juvenile court. In each of these areas, it is useful not only to look at juvenile cases and problems by themselves but also to remember that they are part of a growing due process revolution in American thinking and the law not only about juvenile crime but also about treatment of the mentally ill, about victimless crime, about welfare and poverty law. For instance, PINS statutes establish juvenile court jurisdiction over such behavior as being beyond the control of parents. Are they void for vagueness? Here we might look to analogies in the vagrancy laws which have been successfully attacked in the United States for too broad a delegation of power to the arresting and convicting authorities.

1. Coercion -- less state intervention?

Judges, lawyers, legal scholars, legislators, and others concerned about children are becoming more cautious about the amount of intervention in the lives of families and children.

Research has suggested that there is a higher rate of recidivism for those "treated" by the courts and institutions than those who simply go their own way. In addition, provision of some of these services is expensive. Jerome Miller and his program to deinstitutionalize the Massachusetts treatment-correctional system earlier in this decade won support by pointing out that the cost of incarceration of a juvenile at that time was approximately $10,000, a sum which would buy a college education, psychiatric treatment and even a trip to Europe. Instead, children were placed in regimented and unimaginative institutions which were in many cases little more than holding camps designed to keep kids off the streets and provide political patronage jobs for the employees.

Instead, we are evolving toward a notion of "crisis intervention" -- avoid long term "treatment" and only intervene if there is a specific problem which the state can help resolve. Models here include providing immediate services for runaways and the Sacramento Diversion Project which has been sponsored by the Center for Criminal Justice at the University of California at Davis under the direction of Floyd Feeney. In this later type of program rapid intervention is made at juvenile court intake in an attempt to reduce pretrial incarceration and even the necessity for a hearing itself.

2. Proportionality -- should the disposition fit the offense?

Should the juvenile found to be a shoplifter or truant spend the same amount of time in a correctional institution as the armed robber or murderer? Some are concerned that the

indeterminate sentence lacks elements of essential fairness. In addition, statistics indicate that the status offenders such as children beyond the control of their parents spend a longer time in institutions than those who have committed an offense that would be a crime if they were an adult. Often status offense children come from a situation where there is little or no home. Disenchantment with the indeterminate sentence for adult incarceration is also apparent.

There is a growing notion that the time spent in an institution -- whether under the rationale of retribution, punishment, social defense or some other -- should be in some way related to the offense. An analogy here is the field of mental illness where there is a growing sentiment that it is not fair to lock up someone until they are cured.

3. Transfer to adult court -- when should children treated as adults?

In most jurisdictions, it is possible to transfer serious juvenile offenders to criminal court in the state. The alternative solution is the one adopted by the state of New York: a relatively low age (15) for the ceiling of the jurisdiction of the juvenile court with no transfer for even serious crimes such as murder.

Society is becoming increasingly concerned about serious offenses being committed by juveniles. In New York, there is evidence that juveniles are being used to carry narcotics or even used as "trigger men" for execution in gang wars because of their relative immunity from the criminal law.

There is serious pressure to increase the number of transfers to adult court. On the other hand, defenders of a restrictive transfer system point out that minority children -- blacks, Puerto Rican, chicanos -- are disproportionately subject to transfer to adult court.

4. The scope of due process - should it continue to intake, the prosecutor's office and the correctional institution?

The Supreme Court in the Kent decision in 1966 interpreting the District of Columbia transfer statute, found that some decisions about the disposition of children are so important that they require "ceremony". The Court held that transfer to an adult court was one of these decisions. Consequently, the Supreme Court found that there was a requirement of a hearing, right to counsel, a record which could be used by a reviewing court and that written reasons would be required in transfer proceedings under the District of Columbia statute. Many states adopted these principles in their own transfer of proceedings.

However, the Nixon administration cut back this grant of due process and the District of Columbia which is under the control of the federal government was given statute which made transfer a matter of prosecutorial discretion. If certain crimes were charged (but not necessarily later proven) by the prosecutor, the case was automatically transferred to the adult criminal court. The United States Court of Appeals for the District of Columbia Circuit narrowly upheld this statute but expressly invited Supreme Court review.

The Supreme Court declined this review with three Justices dissenting, and their comments may be prophetic. Among the issues on which the dissenters would have liked to have heard arguments was the question of whether or not the Administrative Procedures Act would apply to prosecutorial discretion. In looking to the future, it is not inconceivable that decisions at intake and decisions to release people from treatment or corrections programs, as well as prosecutorial discretions in transfer, may be subjected to at least some of the formality of administrative law -- such as written administrative decisions and court review.

Probably the most thorough attempt to set standards in this area was the Juvenile Justice Standards Project jointly sponsored by the Institute of Judicial Administration and the American Bar Association. This project has already published* fifteen monographs, and about five more are expected shortly. The topics range from issues in the intervention in the lives of children (such as schools and police) through adjudication (prosecution and court organization) to corrections (dispositional procedures and corrections administration). There are also volumes on such system-wide issues as record keeping and monitoring.

The Standards have been summarized by scholar and judge Orman W. Ketcham in this fashion:

> ...[T]o the dismay of many would-be childsavers, the Standards adopted procedures that in a de facto manner establish a junior criminal court. The consideration of public safety rather than the status needs of the juvenile

*By Ballinger Publishing Company, Cambridge, Massachusetts.

> are the Standards' primary concern. Under the Standards, however, this junior criminal court would not be the kind of criminal court from which the juvenile court movement seceded in Illinois in 1899. It would be a court that, although acknowledging the use of punitive sanctions, prohibits institutional confinement unless the juvenile is a clear and present danger to society. It would be a court that observes the principle of the least intrusive alternative and encourages referral of an errant youth to parents, the school, or a Youth Service Bureau unless the juvenile endangers the public safety. "National Standards for Juvenile Justice" 63 Virginia Law Review 201 (1977) [footnote omitted].

I should like to conclude by emphasizing the need to study the impact of these standards or any other changes in the juvenile justice system. Unfortunately, we are only at the beginning of achieving the necessary experience and data to measure what is really happening in the juvenile justice system. Record keeping has been lamentable throughout the system. We are a society which knows more about sports than justice. I would hazard a guess that it would be much easier for instance in baseball to find out how many short stops have lead the American League at batting than to discover how many children are now lodged in adult jails. However, if we and our institutions are to survive, we must of necessity become an experimenting society.* We must test diversion as Frank Zimring of the University of Chicago has done so skillfully in his study of the Vera Manhattan Court employment project or test the effects of deinstitutionalization in Massachusetts as the special project at the Harvard Center for Criminal Justice under Lloyd Olin has attempted.

*For a more complete exposition of the ideas in these concluding paragraphs, See Nejelski and LaPook "Monitoring the Juvenile Justice System: How Can You Tell Where You're Going, If You Don't Know Where You Are?" 12 The American Criminal Law Review 10 (1974).

We must begin by collecting the necessary base line data and where possible assign rigid control group experiments.

In sum, we must remove the level of discourse from one of theological dispute about the merits of alternative strategies and instead attempt to measure the impact of current and proposed programs. It is impossible to devise a strategy for transfer to adult court when we do not know how many children are currently transferred to adult court, for what types of offenses, for how long, whether or not they are later convicted, and with what the disposition.

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